

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1385

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellant,

-against-

CANDIDO NATAL RIQUELMY and
FELIX LOPEZ,

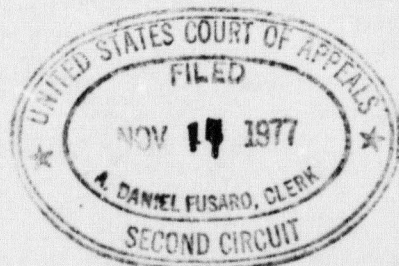
Appellees.

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Appeal from the United States District
Court for the Eastern District of New York

BRIEF FOR THE APPELLEE RIQUELMY

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I N D E X

	<u>Page</u>
PRELIMINARY STATEMENT.....	<u>1</u>
FACTS.....	2
<u>POINT ONE</u>	
THE GOVERNMENT IS PRECLUDED FROM RAISING THE ISSUE OF CANDIDO RIQUELMY'S LACK OF STANDING BY REASON OF ITS FAILURE TO MAKE TIMELY OBJECTION.....	3
<u>POINT TWO</u>	
THE TRIAL COURTS' FINDING THAT CANDIDO RIQUELMY HAD ACTUAL STANDING SHOULD BE AFFIRMED.....	4
<u>CONCLUSION</u>	
THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.....	7
<u>CASES CITED</u>	
BROWN v. U.S. 411 U.S. 223 (1973).....	5
JONES v. U.S. 362 U.S. 257 (1960).....	5
KATZ v. U.S. 389 U.S. 347, 351 (1967).....	3
TERRY v. OHIO 392 U.S. 1 (1968).....	5
U.S. v. GALANTE, 547 F 2d 733 (2d Cir. 1976).....	3
U.S. v. OATES, Slip Op. 6389, 6404 (2d Cir. June 3, 1977)...	3
U.S. v. WESTERBANN-MARTINEZ, - F. Supp -, #77CR- 286 (E.D.N.Y. July 19, 1977).....	3
WONG SUN v. U.S. 471 (1963).....	6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1385

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UNITED STATES OF AMERICA,

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-against-

CANDIDO NATAL RIQUELMY and FELIX
LOPEZ,

Appellees.

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BRIEF FOR THE APPELLEE RIQUELMY

PRELIMINARY STATEMENT

The U. S. A. appeals from an order of the United States District Court for the Eastern District of New York (Constantino, J.) entered on August 3, 1977, granting appellees motion to suppress as evidence a quantity of heroin recovered on March 17, 1977. The appeal is pursuant to 18 U. S. C. §3731.

FACTS

Following his arrest and indictment, the appellee Candido Riquelmy moved for a hearing to determine the validity of the arrests, searches and seizures and statements taken. (A-14)

Without any objection interposed by the government, the matter proceeded to hearing and testimony was taken from Special Agent Gerard Whitmore and Police Officer William Towns.

At the conclusion of the hearing, the court reserved decision pending submission of briefs.

On or about May 10, 1977 brief on behalf of appellee Candido Riquelmy was submitted to the Court (A 156)

On May 18, 1977, the Governments brief in opposition to suppress was served upon the attorney representing the appellee Candido Riquelmy and filed with the Court (A 214)

On August 3, 1977, an order was entered suppressing the heroin, the court noting at the time that enlight of its decision suppressing the heroin a decision regarding the lactose was not necessary (A 218)*

*By reason of the limited issues raised by the government the appellee Candido Riquelmy concedes that the facts as set forth in the governments brief accurately reflect the testimony given at the suppression hearing.

POINT ONE

THE GOVERNMENT IS PRECLUDED
FROM RAISING THE ISSUE OF
CANDIDO RIQUELMY'S LACK OF
STANDING BY REASON OF ITS
FAILURE TO MAKE TIMELY
OBJECTION.

Pursuant to Federal Rules of Criminal Procedure,
Rule 12 (f) Effect of Failure to Raise Defenses or
Objections.

"Failure by a party to raise defenses or
objections or to make requests which must be
made prior to trial, at the time set by the
court pursuant to subdivision (c) or prior
to any extension thereof made by the court,
shall constitute waiver thereof,..."

The appellee Candido Riquelmy contends that the
government's failure to raise objections prior to the hearing
on the merits as to his standing to challenge the validity
of the arrests, searches and seizures and statements taken,
precludes the raising of said issue thereafter.

As the record reflects, the testimony elicited at
said hearing, both in response to direct and cross examination
was with regard to the issue of probable cause and not
appellee's standing.

Suffice it to say, the government should have objected
at the time the appellee moved to suppress rather than wait
till after the hearing on the merits, thus precluding appellee
from his day in court.

POINT TWO

THE TRIAL COURTS' FINDING
THAT CANDIDO RIQUELMY HAD
ACTUAL STANDING SHOULD BE
AFFIRMED

Should this Court disagree with appellee's contention that the Government conceded Candido Riquelmy's standing by the failure to interpose any objection to standing prior to the hearing, appellee respectfully contends that the trial courts finding of actual standing under the conspiracy and Interstate Travel Act counts was proper.

As noted by the trial court below, since possession is neither a sufficient nor a necessary element of the conspiracy or Interstate Travel Act offenses, appellee Candido Riquelmy did not have automatic standing. U.S. v. OATES, sup op. 6389, 6404 (2d Cir. June 3, 1977); U.S.v. GALANTE, 547 F2d 733 (2d Cir. 1976).

Despite this fact, the Court found that appellee had actual standing based upon his presence at the time of the search as well as its finding that both Eddie and Candido Riquelmy were to be viewed collectively as a single unit. (A229-230)

As reasoned by the trial court in U.S. v. WESTERBANN-MARTINEZ F. Supp. , #77-CR-286 (E.D.N.Y. July 19, 1977), the Fourth Amendment guarantee against unreasonable searches and seizures protects "people not places." KATZ v. U.S., 389 U.S. 347, 351 (1967).

Thus despite the fact that the search occurred in a public airline terminal, Candido Riquelmy retained a reasonable expectation of privacy even in those areas accessible to the public Katz supra 351-352. As such, Candido Riquelmy's conceded presence at the time of the search gave him actual standing to move to contest its validity. U.S. v. GALANTE, supra 733; BROWN v. U.S. 411 U.S. 223 (1973).

Moreover, the trial court concluded that Candido Riquelmy had actual standing based upon its finding that agent Whitmore viewed the three defendants collectively as one unit.

The three men were seized within the meaning of the Fourth Amendment when Whitmore stopped them for questioning and directed them back into the baggage claim area in the airport terminal. TERRY v. OHIO, 392 U.S. 1 (1968)

The simultaneous seizure of all three men was based upon Whitmore's observation of their interactions in the airport. All three men were questioned together and directed by Whitmore to return to the airport lobby and it was the search of Eddie Riquelmy's coat pocket which resulted in the ultimate discovery of the heroin and the arrest of Candido Riquelmy.

Since the three men were viewed by Whitmore collectively as a single unit Candido Riquelmy was the victim of an invasion of privacy JONES v. U.S. 362 U.S. 257 (1960) and has standing to object to the seizure itself and the introduction into evidence of any fruits of its poisonous

tree. WONG SUN v. U.S. 371 U.S. 471 (1963)

CONCLUSION

The order of the District Court Should be affirmed.

Dated: Brooklyn, New York
November 21, 1977

Respectfully Submitted,

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EASTERN DISTRICT
OF NEW YORK

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